956

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 94.

LINDLEY E. SINCLAIR, PLAINTIFF IN ERROR,

vs.

THE DISTRICT OF COLUMBIA.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JULY 23, 1902.

(18,617.)

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SUPPEME COURT OF THE UNITED STATES.

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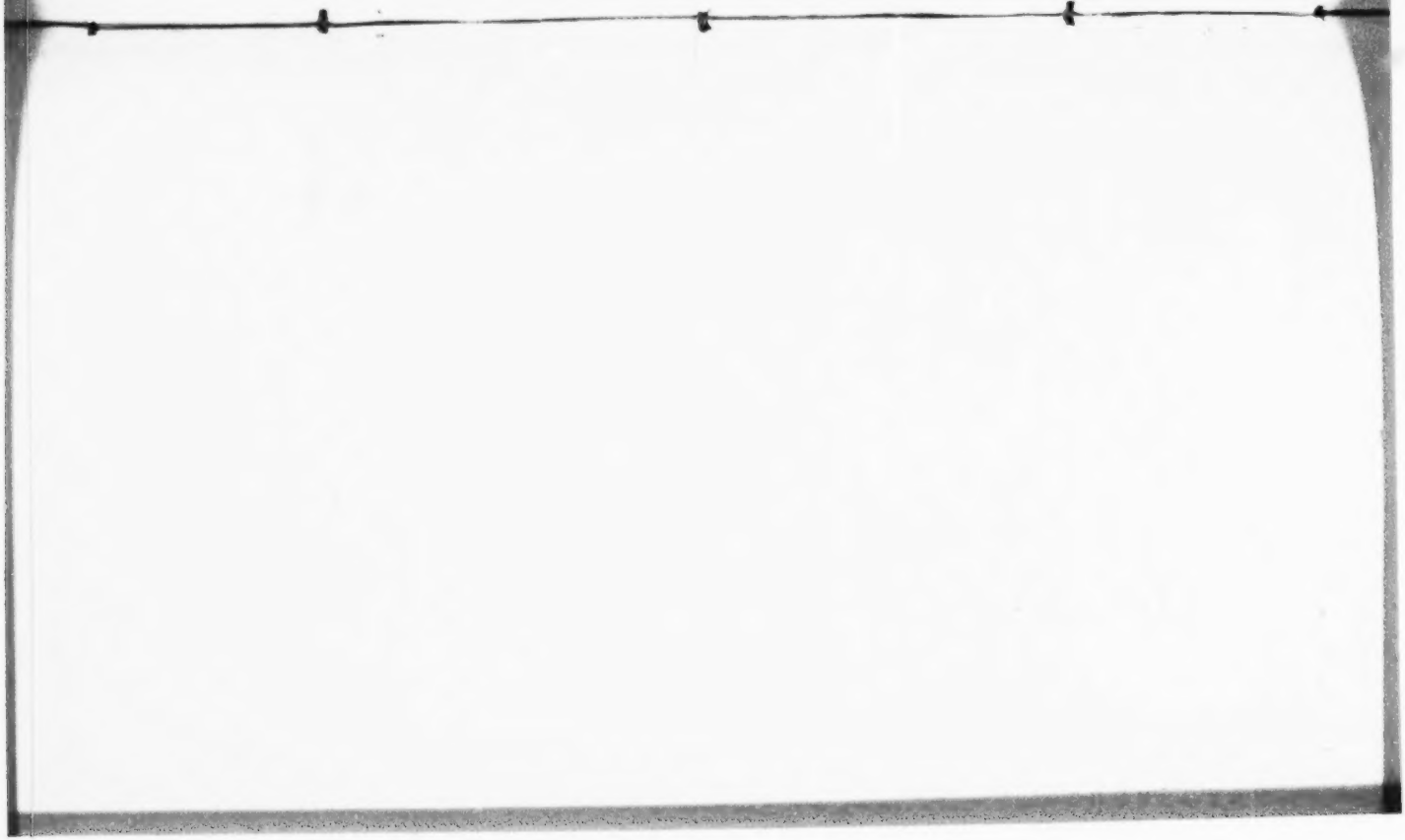

1 In the Court of Appeals of the District of Columbia.

LINDLEY E. SINCLAIR, Plaintiff in Error,
vs.
THE DISTRICT OF COLUMBIA. } No. 1218.

In the Police Court of the District of Columbia, March Term, 1902.

DISTRICT OF COLUMBIA
vs.
LINDLEY E. SINCLAIR. } No. 218,083. Information for Violation of Law for Prevention of Smoke.

Be it remembered that in the police court of the District of Columbia, at the city of Washington, in the said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

In the Police Court of the District of Columbia, February Term, A. D. 1902.

THE DISTRICT OF COLUMBIA, *ss:*

Andrew B. Duvall, Esq., city solicitor for the District of Columbia, by James L. Pugh, Jr., Esq., assistant city solicitor for the District of Columbia, who for the said District prosecutes in this behalf in his proper person, comes here into court and causes the court to be informed and complains that Lindley E. Sinclair, late of the District of Columbia aforesaid, on the 11th day of February, in the year A. D. nineteen hundred and two, in the District of Columbia aforesaid and in the city of Washington, being then and there the occupant of a certain building, to wit, the building situated at number 213 14th street northwest, in the city aforesaid, in the District aforesaid, to which said building there is attached a smokestack and chimney used in connection with a certain stationary engine, steam boiler, and furnace in said building, the said Lindley E. Sinclair, as such occupant, did then and there unlawfully cause, permit, and allow the emission into the open air from the said smokestack and chimney, situated as aforesaid, certain thick and dense black and gray smoke, which was then and there a public nuisance, contrary to and in violation of an act of Congress for the prevention of smoke in the District of Columbia, and for
2 other purposes, approved February 2, 1899, and constituting a law of the District of Columbia.

ANDREW B. DUVALL, Esq.,
City Solicitor for the District of Columbia.
By J. L. PUGH, Jr.,
Assistant City Solicitor for the District of Columbia.

Personally appeared F. L. Wollard this 18th day of February, A. D. 1902, and made oath before me that the facts set forth in the foregoing information are true, and those stated upon information received he believes to be true.

JOSEPH HARPER,
Deputy Clerk of the Police Court
for the District of Columbia.

[Endorsed:] Col. —. No. 218,083. Information. District of Columbia *vs.* Lindley E. Sinclair. Mar. 26, guilty. J. T. D. Violation of act for the prevention of smoke. Concealed weapons. P. W. G. Witnesses: F. L. Wollard, officer; H. S. Bolton, James B. Lackey, John B. Sullivan. 4–17. 50–90. Ap. noted. 3–25, 26. Filed March 18, 1902. Joseph Y. Potts, clerk police court, D. C.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Charles F. Scott, judge of the police court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said police court, before you, between The District of Columbia, plaintiff, and Lindley E. Sinclair, defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Court of Appeals of the District of Columbia, together with this writ, so that you have the same in the said Court of Appeals, at Washington, within 15 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Richard H. Alvey,
Seal Court of Appeals, District of Columbia. Chief Justice of the said Court of Appeals, the 25th day of April, in the year of our Lord one thousand nine hundred and two.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by—

SETH SHEPARD,
Associate Justice of the Court of Appeals
of the District of Columbia.

3 In the Police Court of the District of Columbia, March Term, 1902.

DISTRICT OF COLUMBIA vs. LINDSLEY E. SINCLAIR. } No. 218,083. Information for Violation of Law for Prevention of Smoke.

Defendant arraigned March 6, 1902; plea, not guilty; jury trial demanded.

Mar. 26.—Verdict, guilty.

April 17.—Judgment, guilty; sentence, to pay a fine of fifty dollars and in default to be committed to the workhouse for the term of ninety days.

Exceptions taken to rulings of court on matters of law and notice given by defendant in open court, at the time of several rulings, of his intention to apply to a justice of the Court of Appeals, D. C., for a writ of error.

Mar. 28.—Motion for new trial filed; motion overruled.

Mar. 28.—Bill of exceptions filed.

April 4.—Stipulation of counsel filed extending time for presentation of bills of exceptions to court for settlement and signature.

April 17.—Appeal noted; bills of exceptions settled and signed.

Recognizance in the sum of $100 entered into on writ of error to Court of Appeals, D. C., upon the condition that in the event of the denial of the application for a writ of error the defendant will, within five days next after the expiration of ten days, appear in police court and abide by and perform its judgment, and that in the event of the granting of such writ of error the defendant will appear in the Court of Appeals of the District of Columbia and abide by and perform its judgment in the premises.

George H. Harries, surety.

Thereupon proceedings stayed for ten days.

April 25.—Writ of error received from Court of Appeals.

MAY 8TH, 1902.

I hereby certify under the seal of this court that the foregoing is a true copy of the record of the proceedings had in the police court in the above-entitled case.

JOSEPH HARPER,
Dep. Clerk, Police Court, Dist. of Columbia.

In the Police Court of the District of Columbia.

DISTRICT OF COLUMBIA
vs.
LINDLEY E. SINCLAIR. } No. 218,083.

Motion for New Trial.

Now comes the defendant in the above-entitled cause and moves the court to set aside the verdict of the jury rendered therein and to grant a new trial for the following reasons:

4 1. Because the act of Congress under which the defendant was proceeded against is unconstitutional.

2. Because the verdict is contrary to the evidence.

3. Because the verdict is contrary to law.

4. Because of errors of law committed by the presiding justice at the trial.

J. J. DARLINGTON,
C. C. COLE,
Attorneys for Defendant.

Notice.

The above motion will be called to the attention of the police court of the District of Columbia, Mr. Justice Scott presiding, on Tuesday, the first day of April, A. D. 1902, at 10.30 o'clock a. m., or as soon thereafter as counsel can be heard.

J. J. DARLINGTON,
C. C. COLE,
Attorneys for Defendant.

In the Police Court of the District of Columbia.

DISTRICT OF COLUMBIA
vs.
LINDLEY E. SINCLAIR. } No. 218,083.

DISTRICT OF COLUMBIA
vs.
LINDLEY E. SINCLAIR. } No. 219,243.

It is, this third day of April, 1902, stipulated and agreed that the bill of exceptions in the above-entitled cases may be presented to the court for settlement and signature on the eighth day of April, 1902.

E. H. THOMAS,
JAMES L. PUGH, JR.,
Counsel for Government.
C. C. COLE,
W. C. SULLIVAN,
Counsel for Defense.

Filed March 28, 1902. Joseph Y. Potts, Clerk Police Court, D. C.

In the Police Court of the District of Columbia.

DISTRICT OF COLUMBIA
vs.
LINDLEY E. SINCLAIR. } No. 218,083.

Bill of Exceptions.

At the trial of this case, begun on the 25th day of March, A. D. 1902, before Charles F. Scott, Esquire, one of the justices of the police court of the District of Columbia, and the jury impanelled and sworn to try the issues in said cause, the District of Columbia, to maintain the issues upon its part joined in said cause, produced as a witness on its behalf one FRANK WOLLARD, who testified that he is one of the inspectors of the health office detailed to investigate and observe the smoke nuisance; that on the 11th day of February, 1902, he observed the smokestack of the electric lighting company at the plant of that company at 213 14 street northwest from the roof of the District building, and that dense black smoke was emitted from the stack from 10.48 to 10.52 a. m., from 11.10 to 11.12 a. m., from 11.26 to 11.30 a. m., from 1.15 to 1.20 p. m., all on said day; that he has since visited said place, and that the smoke comes from the black, round, iron stack of the U. S. electric plant and chimney which is attached to thirteen furnaces and boilers and eight stationary engines in the plant of that company; that the defendant has an office in that building over which is a sign reading, "Office of the general superintendent," and that his room is on the second floor of the building.

Upon cross-examination the witness stated that he was detailed by the Commissioners or by the health office to make these smoke observations about two months ago, and he was thereupon interrogated and answered as follows:

Q. What observation did you make to determine whether this smokestack of which you speak proceeds from the roof of the building No. 213 Fourteenth street northwest?

A. The stack is plainly visible from the top of the District building.

Q. Yes; but you cannot see the number "213 Fourteenth street" from the top of the District building, can you?

A. I afterwards made two visits to No. 213 Fourteenth street northwest and found the stack that I saw from the roof of the District building was connected with that number.

Q. How is it connected with No. 213?

A. It rises from about the center of the building—those premises.

Q. From the center of 213 Fourteenth street? You are positive of that, are you?

Mr. THOMAS: He said "those premises."

A. Those premises. I said from the premises of the electric lighting company.

By Mr. DARLINGTON:

Q. By "those premises" you mean 213 Fourteenth street, do you?

A. I mean the plant of the U. S. Electric Light Company.

Q. Will you not please answer my question? I did not ask you anything about the plant of the company. I asked you what means you had taken to verify your statement that this smokestack proceeds from premises 213 Fourteenth street?

A. I told you that it comes from the center of the building known as 213 Fourteenth street northwest.

6 The witness further testified that he does not know that there is a twenty foot space between 213 Fourteenth street and the power-house with which the smokestack is connected.

Thereupon, further to maintain the issue upon its part joined, the District of Columbia produced as a witness on its behalf one HENRY S. BOLTON, who testified that he was the engineer of the United States Electric Lighting Company's power plant at 14th and B streets northwest, in the city of Washington; that the witness Bolton is in charge of the machinery and all the men employed in the said power plant or station, including the men employed on the furnaces and on the engines and the firemen; that the defendant Sinclair is his superior officer and was such on the 11th day of February, 1902, and that he does not know who purchased the coal used at the said station.

Q. To whom do you make your reports?

A. Mr. Sinclair.

Mr. DARLINGTON: One moment. I object. Mr. THOMAS: He has answered it. Mr. DARLINGTON: Very well, go ahead. I object, if the court please, because those reports are in writing and they will show to whom they are made. They are the only competent legal evidence. Mr. PUGH: There is no proof here yet showing that they are written reports, Mr. Darlington. Mr. DARLINGTON: Then I object to the question. Mr. PUGH: He said that he made his reports to Mr. Sinclair. Mr. DARLINGTON: *Well*, the answer was made before I could object to it. The objection is that this is not competent, but when you are calling for a report your question must show whether you mean a written or verbal report, and if in writing it must be produced. The COURT: What is the objection now? Mr. DARLINGTON: The witness has answered the question. The objection is to the question, to whom he made his reports. That would be shown by the reports themselves. They are in writing and they are the only competent evidence. The COURT: Your objection is overruled, there being as yet no evidence to show whether written or oral. Mr. DARLINGTON: And I note an

exception. The witness further testified that his reports were sometimes verbal and sometimes in writing, and that the written reports and also the verbal ones were made to the defendant Sinclair; that the witness has been identified with this plant since April, 1901, and that the defendant has been his superior officer since that time, and that the defendant's official designation is general superintendent, U. S. Electric Lighting Company.

Q. What control did he exercise over those premises?

Mr. DARLINGTON: I object to that question as calling for an opinion of the witness. I have no objection to testimony as to any facts, any instances of control, but it is not for this witness to give his opinion as to what Mr. Sinclair's control is.

Mr. THOMAS: I only want him to tell what he has seen him do and what he knows he does.

7 Mr. DARLINGTON: I have no objection to that.

The WITNESS: There are a great many things he does as general superintendent.

By Mr. THOMAS:

Q. What are they?
A. I cannot enumerate them.
Q. Are they too many?
A. They are too many.
Q. What does he do with reference to the running and control of that particular plant?
A. He takes no active part in it.

* * * * * * *

Q. You say he gave you orders?
A. I have received orders from Mr. Sinclair.
Q. Orders to do what?
A. Oh, different things. I do not recall any particular order.
Q. You do not recall any particular order? Who employed you there?
A. Mr. Sinclair.
Q. Did you make any arrangements with him about the rate of pay?
A. I did.
Q. Do you employ the others under you there?
A. I do.
Q. Do you submit the matter of their employment to Mr. Sinclair?
A. I do not.
Q. Mr. Sinclair employed you, and your general employment was to have control of those under you? Is that it?

Mr. DARLINGTON: I object to the question as leading.

A. Yes, sir.

By Mr. THOMAS:

Q. Are there firemen under you?
A. There are.
Q. How many firemen are there?
A. Twelve.
Q. What are their duties?
A. To fire the furnaces.

Thereupon the witness was asked what kind of coal is used at said power plant; to which question the defendant objected on the ground that it *is* already appeared from the testimony of the witness that he did not know who purchased the coal; that the defendant took no active part in the running of the furnaces or engines, and that any inquiry as to the kind of coal used there was incompetent, immaterial, and inadmissible as against the defendant; but the court overruled the said objection and permitted the witness
8 to answer that the coal used was bituminous; to which ruling then and there — noted an exception, which was duly allowed.

Thereupon the witness further testified that the offices of the defendant Sinclair was in number 213 14th street northwest, and that this building is across an alley from the plant, but whether it is a private or public alley witness could not say; that there are gates at the entrance to this alley, used to close this alley, extending from the north wall of the power plant to the south wall of number 213 14th street, and that through this alley coal and supplies of different kinds are brought into the power plant, the gates being opened when the carts or wagons come in and closed when they go out.

Upon cross-examination the witness Bolton testified that the vacant space between the power plant and number 213 14th street is about eighteen feet; that witness had charge of the machinery and of all the men employed in the plant and the furnaces and the firing; that he recalls no order from the defendant in any manner concerning the firing or running of the furnaces, boilers, or engines; that the witness is paid by the United States Electric Lighting Company, not by Sinclair, and that in testifying that Sinclair employed him he simply meant that Sinclair made the contract with him to work for the company. Q. You have made some reference to certain reports as being made to Sinclair. Are those reports made to Sinclair or to the company? A. They are made to Mr. Sinclair. Q. Are they in writing or oral? A. Both; generally in writing. Q. Mr. Bolton, is your recollection clear that these reports of which you speak are not addressed to the United States Electric Lighting Company? A. It is.

Upon redirect examination the witness stated that he could not say whether there was any distinct statement made as to whom he was employed for at the time the contract was made with Sinclair; that the power station fronts about 120 feet on 14th street and 220 feet on B street, and that it does not include number 213 14th street;

that he is speaking of the building containing the machinery and is cutting out the eighteen-foot alley; that the building comprised within said 120 feet on 14th street and 220 feet on B street is the building containing the machinery, and that it is situated at 14th and B streets; that the fence or gates simply run from the north wall of the power plant to the *the* south wall of number 213 14th street, but connects from building wall to building wall, parallel to the building line of the street where the machinery is. Q. Does not the same fence connect the premises? A. There is a gate across the alley from the building containing the machinery. Q. Does that connect the premises? A. I don't know. Q. Do you know what "connect" means? A. No. Q. You do not? A. Not in a legal sense. Q. Well, in general, common sense, ordinary sense? A. Why, certainly; there is a gate connecting one building to the other. Q. The premises are connected, then, are they not, in that manner? Mr. DARLINGTON: Connected by a fence between them?

Mr. THOMAS: Yes. A. Yes.

9 Upon further cross-examination witness stated: Q. "Is number 213 14th street fenced in at all, Mr. Bolton? Is there any fence around you? A. No; I should say not. I do not know." Witness further stated that the defendant Sinclair has no office or desk or anything else in the building which contains the machinery; that there is no number at all on any building except the office building; that persons going to pay bills due the electric lighting company would go to the treasurer's office, which is 213 14th street, the building in which the defendant has his offices; that the power-plant building has no number upon it, and 213 was the only one with a number on it; that the building in which Sinclair's office is located is number 213 14th street; that he has seen the defendant there frequently; that he cannot say whether there are any other houses along there which have numbers upon them; that he obtained his coal and other supplies by drawing a requisition upon the storekeeper, who is E. McCarthy; that his requisition bills come from the storekeeper to witness, who checks them as approved by him, and returns them to the storekeeper, and that he does not know whether they ever come into the hands of Sinclair or not. Thereupon counsel for the defendant produced a number of written reports made by witness to the defendant, and the witness testified that they were his daily reports of the amount of work done by the station; that they were the reports of the electrical output of the station, and that the report of February 11th shows such output for that day; that the witness makes other written and verbal reports to the defendant at times about the general condition of the machinery or anything that arises that makes necessary a report.

Thereupon the District of Columbia announced its case closed; and thereupon the defendant introduced evidence and produced witnesses who testified as follows:

JAMES B. LACKEY, a witness called on behalf of the defendant, testified that the said Sinclair is an employé of the United States Electric Lighting Company, appointed by one of its general officers, either the treasurer or the vice-president; that he is not a general officer or an elective officer, elected by either the stockholders or the board of directors, but is appointed by either the treasurer or vice-president, and that his manner of appointment does not differ from linemen, motormen, or other employés of that character; that his office is in the building designated as number 213 14th street, which is not connected in any way with the power-plant building, from which latter building the smokestack proceeds and where the smoke is created and discharged; that the power plant was formerly at 13½ and B streets, on the other corner of the square, the office being then, as now, at 213 14th street, and that a few years ago the power plant was erected at the northeast corner of 14th and B streets; that the buildings on 14th street belonged to the lighting company and used for its different purposes are five in number, namely, numbers 213, 215, 217, 219, and 221, 14th street; that the defendant Sinclair had no office, desk, or other occupancy of the power-plant building, which is an entirely separate building from 213 14th —, and that the occupant of the power-plant building is the electric lighting company, by which employer Sinclair is located in a different building from its power plant.

Upon cross-examination this witness was asked the following: Q. Were you present when Mr. Sinclair was employed? A. (After a pause.) I have been present at conferences of the officers when his appointment—— Q. Were you present when Mr. Sinclair was employed? That is the question. A. I can fairly say that I took part in his employment. Q. I am not asking you what you can fairly say. I ask if you were actually present when he was employed? A. What do you mean by his employment? Do you mean when he was told that he should go to work—— Q. I mean what I say. Were you actually personally present when he was hired? Mr. DARLINGTON: I submit, if the court please, that the question is a very vague one. In the employment of a man by a company like this there are at least two steps. There is, first, the determination of the officers to appoint him. There is, second, the personal communication to him. I think the witness has a right to ask to which of these things my friend refers. Mr. THOMAS: The witness has testified from personal knowledge, presumably, that Mr. Sinclair was employed by some manager, or the president of the company. Now, I want to know from him whether he was personally present when he was hired. That, I submit to the court, is a very simple question. The COURT: That may be answered. The WITNESS: I would not be able to answer that question, Judge, until he specifies just what he means by asking whether I was present when he was employed or not. If he means if I was present when some officer stated to Mr. Sinclair that he should be superintendent—— Mr. THOMAS: Mr. Lackey, you have counsel here who will take care of you, and you need not argue the case. Mr. DARLINGTON:

The witness has a right to state his difficulty in answering the question. The WITNESS: I am unable to answer your question, because it is not clear to me. Mr. THOMAS: Never mind, sir; if you are unable to answer it, that is all I want to ask you on that particular point. The witness further stated that number 217 14th street is a store-room, used in part for the United States Electric Lighting Company and in part by the Potomac Electric Light and Power Company; that number 219 14th street is used in part as a store-room and in part as a lamp department and office for workmen and other employés, as is also number 221 14th street; that there is no number on the power-plant building; that premises number 213, 217, 219, and 221 are among the various offices of the company; that there is no office of the company, nor any of its officers, in said power-plant or machinery building, except that Bolton, the engineer of the station, has an office there.

On redirect examination, this witness testified that the Potomac Electric Power Company also has an office in No. 213 14th street, and that the general officers of the United States Electric
11 Lighting Company are a president, a vice-president, a secretary, a treasurer, and general manager, the latter being H. W. Fuller, and that the purchase of fuel is directed by the general officers of the company; that there is no record of such purchase except correspondence with dealers, or it may be by conversations, from whom it was purchased, and that there is no complete record of coal purchases.

Thereupon the defendant produced as witness on its behalf JOHN T. SULLIVAN, who testified that he was a steam engineer by occupation, and that he had ten years' experience in operating furnaces and plants for the production of electricity either for lighting or for motive power; whereupon the witness was asked the following question: What can you tell us as to the possibility of conducting or operating a plant which will produce power for lighting purposes without the emission at times of dense gray or black smoke? To this question counsel for the District of Columbia objected; whereupon counsel for the defendant stated: If the court please, this is a formal proof as to which I concede I think your honor is concluded by the opinion of the Court of Appeals. Of course, it is for you to decide about that. The point I propose is this: This company, under the express or implied license of Congress, or both, has expended a very large amount of money in establishing a plant here in the District of Columbia. It is charged with great public duties. The lighting of the streets of the city is a part of its duty, in addition to the illumination of public and private residences and business houses. It is under a legal obligation to perform this work. It would be liable in damages if it refused. The point that I wish to make is that any act, especially an act passed after a company has been authorizen and directed to expend large sums of money in installing costly and important public improvements, which deprives it of the power of using its property, an act which disables it from perform-

ing a public duty, for the neglect of which or the failure to perform which it would be liable in damages, would be an unconstitutional act; and if we can prove to the satisfaction of the jury that the emission of such smoke under such circumstances as shown in this case is absolutely indispensable to the company's enjoyment of its property and to the performance of its public duties which it is obliged to perform, then to that extent the act would be unconstitutional. We offer this testimony in that connection, and we offer to prove the facts to which we refer. Mr. PUGH: To that we object, if your honor please. The COURT: Have you anything to say on the matter, gentlemen? Mr. THOMAS: We contend, your honor, that that point was expressly passed upon and decided in the Moses case. The COURT: The objection is sustained. Mr. DARLINGTON: We except to the exclusion of the evidence; which exception was duly allowed.

Thereupon, the foregoing being all the evidence in the case, the District of Columbia requested the court to instruct the jury as follows:

1. That the jury are instructed that the emission of dense
12 or thick black or gray smoke from any smokestack or chimney used in connection with any stationary engine, steam boiler, or furnace of any description within the District of Columbia is a public nuisance.

To the granting of which instructions the defendant then and there objected; but the court overruled his said objection and granted the said instruction; to which the defendant then and there excepted; which exception was duly noted on the minutes of the court and allowed.

2. The jury are instructed that they are not at liberty to consider the policy of Congress in declaring in its act approved February 2, 1899, that the emission of dense or thick black or gray smoke — a public nuisance, as defined by the court in prayer No. 1, nor the necessity or supposed inconvenience or hardship, if any, of such law, and that the policy of enacting such law is a matter peculiarly and exclusively within the province of Congress, which cannot be disregarded or be set aside by either the court or the jury.

To the granting of which instruction also the defendant then and there objected; but the court overruled his said objection and granted the said instruction; to which the defendant then and there excepted; which exception was duly noted on the minutes of the court and allowed.

3. The jury are instructed that if they find from the evidence that the defendant at the time charged in the information had an agency in the control of the furnace at the premises mentioned in the information and evidence, then he was an occupant of said premises and building within the meaning of the act of Congress under which he is now proceeded against.

To the granting of which instruction the defendant then and there objected; but the court overruled his said objection and granted the

said instruction; to which the defendant then and there excepted; which exception was duly noted on the minutes of the court and allowed.

4. The jury are instructed that if they find from the evidence that the defendant was the superintendent of the owner of said building mentioned in the information and evidence, and had control of the furnace or of the engineer or other persons, if any, who operated the same at the time mentioned in the information, then the defendant is an occupant of said building within the meaning if the act of Congress under which he is now proceeded against.

To the granting of which instruction the defendant then and there objected; but the court overruled his said objection and granted the said instruction; to which the defendant then and there excepted which exception was duly noted on the minutes of the court and allowed.

5. If the jury believe from the evidence that Lindley E. Sinclair, named as defendant in the information in this case, was, on the 11th day of February, 1902, the superintendent of the building situated at 14th and B streets northwest, in the city of Washington, District of Columbia, described in the information as 213 14th street
13 northwest, and known as the plant of the United States Electric Lighting Company, then in contemplation of law he was the occupant of said building.

To the granting of which instruction the defendant then and there objected; but the court overruled his said objection and granted the said instruction; to which the defendant then and there excepted; which exception was duly noted on the minutes of the court and allowed.

Thereupon the defendant prayed the court to grant the following instruction-:

1. That the jury are instructed to return a verdict for the defendant.

Which instruction was objected to on behalf of the District of Columbia and was rejected by the court, and to the refusal of the court to grant the said instruction the defendant then and there excepted, and the exception was noted upon the minutes of the court and duly allowed.

2. The jury are instructed that there is no evidence in this case from which they are entitled to find that the defendant was the occupant of No. 213 14th street northwest on the 11th day of February, 1902, as charged.

Which instruction was objected to on behalf of the District of Columbia and was rejected by the court, and to the refusal of the court to grant the said instruction the defendant then and there excepted, and the exception was noted upon the minutes of the court and allowed.

3. The jury are instructed that they must acquit the defendant unless they believe from the evidence that he was, on February 11th, 1902, an occupant of the building from the smokestack or

chimney of which there issued or was emitted the smoke described in the testimony in this case.

Which instruction was objected to on behalf of the District of Columbia and was rejected by the court, and to the refusal of the court to grant the said instruction the defendant then and there excepted, and the exception was noted upon the minutes of the court and duly allowed.

4. The defendant is entitled to a verdict of acquittal unless the jury find from the evidence that he was, on February 11th, 1902, the occupant of No. 213 14th street N. W., and that he participated in or controlled the use of the furnaces, boilers, stationary engines, or other machinery or appliances which caused or emitted the smoke shown by the evidence in this case.

Which instruction was objected to on behalf of the District of Columbia and was rejected by the court, and to the refusal of the court to grant the said instruction the defendant then and there excepted, and the exception was noted upon the minutes of the court and duly allowed.

5. The jury are instructed that they are not at liberty to infer from the mere fact that the defendant is known as general superintendent of the United States Electric Lighting Company or 14 from the fact that he is a superior officer of the witness Bolton, if unaccompanied by evidence satisfactory to them, that he was in control of or participated in the operations of the plant causing the smoke described in the evidence, to find that he is the occupant of the said premises or to convict him in this case.

Which exception was objected to on behalf of the District of Columbia and was rejected by the court, and to the refusal of the court to grant the said instructions the defendant then and there excepted, and the exception was noted upon the minutes of the court and duly allowed.

And thereupon the court, at the request of the defendant, charged the jury as follows:

6. The jury are instructed that before they can convict the defendant they must be satisfied beyond a reasonable doubt that he is guilty of the offence charged. If, upon the whole evidence in the case, they entertain a reasonable doubt whether he was an occupant of the building from which smoke was emitted, as charged, or whether he had an agency in the control of the furnace or of the engineer or other persons who operated the same at the time mentioned in the information, then it is their duty to render a verdict in his favor.

All the foregoing exceptions were duly taken before the jury retired and were duly noted by the court on its minutes at the time the same were severally taken.

Thereupon, after the jury had retired, they requested to be allowed to return to the court and receive further instructions; which request being granted, the jury prayed the court to instruct them upon the following question:

"According to the information, if we find that there is no smoke-

stack attached to the building No. 213 14th street N. W., then should our verdict be not guilty?"

Whereupon the following proceedings ensued:

The COURT: The instructions I have given you, gentlemen, I think, cover the very question.

(Reading:) "The jury are instructed that if they find from the evidence that the defendant at the time charged in the information had an agency in the control of the furnace at the premises mentioned in the information and in the evidence, then he was an occupant of said premises and building within the meaning of the act of Congress under which he is now proceeded against."

The FOREMAN: But the information says 213, your honor.

The COURT (continuing): "The jury are instructed, fourth, that if they find from the evidence that the defendant was the superintendent of the owner of said building mentioned in the information and had control of the furnace or of the engineer or other persons, if any, who operated the same at the time mentioned in the information, then the defendant is an occupant of said building within the meaning of the act of Congress under which he is now proceeded against."

The FOREMAN: But that also says 213 in the information.

15 The COURT: Yes; the instruction covers the building mentioned in the information.

Mr. DARLINGTON: That is 213.

Mr. THOMAS: Mr. Darlington presented to your honor a prayer to take the case from the jury on the ground that on No. 213 there was not a smokestack. The whole point is whether this building, No. 213, is connected with that plant, and not whether there is a smokestack or chimney on the identical piece of property, No. 213, but at that place—the premises comprised in that number—the whole premises.

Mr. DARLINGTON: You mean independently of 213?

Mr. THOMAS: His illustration was that the city post-office building was not connected with the Post-office, and that this building was not connected with that (indicating the one to the east of the court room). My reply to that was that it was a description of the whole premises and connected together. Therefore, I submit, the question ought to be answered "No," unless they find that the building was not connected with the plant.

Mr. DARLINGTON: If the court please, we are there charged with causing smoke to issue from a chimney connected with part of premises No. 213 14th street N. W. Your honor referred to the jury the question whether or not No. 213 14th street was the building with which the chimney was connected and from which the smoke issued. Now, the jury ask you a very plain question. They say, If we find that the smokestack is not connected to No. 213 14th street should our verdict be not guilty? Is any court in the world to say that a man may be indicted or informed against for occupancy of and causing smoke to issue from one building and be convicted for oc-

cupancy of and causing smoke to issue from another and different building?

The COURT: Gentlemen of the jury, you are the judges of the fact, from the evidence before you, whether the building 213 is a part of the general building in which this power is made and from which the smoke escapes through this smokestack. You have the evidence. It is not for me to say whether the gate which connects 213 with the other premises connects it. You are the judges of the fact, and that is a question of fact for you to determine, and it is for you to determine whether the building from which this smoke is emitted is the building described in the information, having thereto attached the smokestack, furnace, steam boiler, and a stationary engine for some kind of work. 213 is named in the information, but the evidence is before you to determine whether the smokestack is connected with the premises, the emission from which of such smoke violates the law in making the nuisance. That is my understanding of it, and the testimony is before you to determine whether they are the same building or not.

The FOREMAN: We will be unable to agree unless your honor gives us a decided answer. It is very hard for us to agree.

The COURT: I am not here to determine whether 213, 17, 16 19, is either one or two or more buildings. You have the facts. I might illustrate. In the city of New York and elsewhere they have power, where the power is created by a stationary engine, steam boiler, and a furnace, the smoke passing through a smokestack which need not be within half a mile of where the power is applied. The power is distributed over the city, and the smokestack may not be connected with or be anywhere near the place where the power is applied, and I think that is an illustration you may use.

Mr. DARLINGTON: We object to that illustration and except to it. The jury do not ask your honor to determine whether 213 is the building from which the smoke issues. Their inquiry is, "If they find that that smokestack is no part of building No. 213, should they acquit the defendant?"

Which exception to the court's said illustration was noted upon the minutes of the court and duly allowed.

Mr. THOMAS: I submit, if the question is answered categorically, the answer should be no.

The COURT: I will say to you, gentlemen, in the light of all the evidence and the instructions, I should say no.

Mr. DARLINGTON: And we except to that.

The COURT: Yes, in the light of all the evidence and instructions, I say no.

Which exception to the court's reply to the request of the jury for further information was noted upon the minutes of the court and duly allowed.

Whereupon the jury retired, and upon returning to the court-room rendered a verdict of guilty.

The defendant, in connection with and at the time of each of the

exceptions by him taken to the rulings of the court in the case, set out in this bill of exceptions, gave notice of his intention to apply for a writ of error, and each of his said exceptions, together with his several notices of intention to apply for a writ of error, were duly noted upon the minutes of the court, and the defendant presented this his bill of exceptions to the court for signature within three days thereafter, namely, on the 28th day of March, 1902.

The foregoing exceptions are signed as the several exceptions taken at the trial of the above-named cause this 17th day of April, A. D. 1902, *nunc pro tunc*, and within two days after said sentence.

CHARLES F. SCOTT. [SEAL.]

This bill is approved as a correct summary of evidence and rulings.

E. H. THOMAS, *For D. C.*
J. J. DARLINGTON,
Attorney for Defendant.

17 In the Police Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss*:

I, Joseph Y. Potts, clerk of the police court of the District of Columbia, do hereby certify *that* the foregoing pages, numbered from 1 to 25 inclusive, to be true copies of originals in cause No. 218,083, wherein The District of Columbia is plaintiff and Lindley E. Sinclair defendant, as the same remain upon the files and records of said court.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, — the city of Washington, in said District, this 8th day — May, A. D. 1902.

JOSEPH Y. POTTS,
Clerk Police Court, Dist. of Columbia.

Endorsed on cover: District of Columbia police court. No. 1218. Lindley E. Sinclair, plaintiff in error, *vs.* The District of Columbia. Court of Appeals, District of Columbia. Filed May 9, 1902. Robert Willett, clerk.

18 WEDNESDAY, *June 4th, A. D.* 1902.

LINDLEY E. SINCLAIR, Plaintiff in Error,
vs.
THE DISTRICT OF COLUMBIA. } No. 1218.

The argument in the above entitled cause was commenced by Mr. J. J. Darlington, attorney for the plaintiff in error, and was continued by Mr. E. H. Thomas, attorney for the defendant in error.

THURSDAY, *June 5th, A. D.* 1902.

LINDLEY E. SINCLAIR, Plaintiff in Error,
vs.
THE DISTRICT OF COLUMBIA. } No. 1218.

The argument in the above entitled cause was continued by Mr. E. H. Thomas attorney for the defendant in error and was concluded by Mr. J. J. Darlington attorney for the plaintiff in error.

19 LINDLEY E. SINCLAIR, Plaintiff in Error,
vs.
THE DISTRICT OF COLUMBIA. } No. 1218.

(Mr. Justice SHEPARD delivered the opinion of the court.)

Like No. 1219, recently decided, this case comes before us on a writ of error to the police court of the District, in which the plaintiff in error, Lindley E. Sinclair, was convicted of the violation, on February 11, 1902, of what is commonly called the "smoke law" enacted by Congress for the District of Columbia.

The only difference between this case and No. 1219, aforesaid, is in the form of the information.

This, in the case at bar, contains but one count, which charges, that the defendant in the city of Washington, District of Columbia, on February 11, 1902, "being then and there the occupant of a certain building, to wit, the building situated at No. 213, 14th street north west, in the city aforesaid, in the District of Columbia, to which said building there is attached a smoke stack and chimney used in connection with a certain steam boiler, and furnace in said building, the said Lindley E. Sinclair, as such occupant, did then and there unlawfully cause, permit and allow the emission into the open air" &c. &c. &c.

In the preceding case, (No. 1219), upon evidence substantially similar in respect of the description of the premises where the business of the United States Electric Lighting Company is carried on, under the general superintendence of the defendant, it was held that the defendant, as such general superintendent of the company, was rightly charged as occupant and agent of the building to which the smoke-stack was directly attached, because, among other grounds, each contiguous house upon the same premises used in carrying on the business of the defendant's principal must be regarded as included in one general building.

20 The information in No. 1219 did not undertake to describe the building by particular number, as is the condition in the case at bar.

That the particular description of the building by street number was wholly unnecessary there can be no doubt.

Assuming it to be true, then, as contended on behalf of the plaintiff in error, that the evidence fails to show that the smoke stack,

from which the prohibited smoke was emitted, was attached to the particular one of the contiguous houses known as No. 213, 14th street, the question arises, whether the prosecution was bound by the particular description as alleged.

We are of the opinion that it was not. The street number of the building was not an ingredient of the offence. It was not essential by way of identification—and could have been omitted without affecting the charge of the offence in any respect whatever. Being mere harmless surplusage it could be disregarded in evidence even if not alleged under a *videlicet*. U. S. *v.* Sumner 3 Story 12, 13; U. S. *v.* Vickery (U. S. C. C. Md.) 1 H. & J. 427; Rawlings *v.* State 2 Md. 201, 212; Henderson *v.* State 105 Ala. 82, 85; McConnell *v.* State 22 Tex. Ct. App. (Cr.) 354, 368; State *v.* Hecht 23 Minn. 549.

The allegation of the particular number, however, was made under a *videlicet*, as shown in the extract from the information heretofore given.

It is true that the *videlicet* would not have the effect to relieve the pleader from proof if the fact so alleged be necessary to the description of the identity of that with which it is connected. But when the particular allegation, descriptive of time, place, &c., is not so essential, its statement under the *videlicet* clearly indicates that the pleader has not undertaken to prove the precise facts and circumstances so alleged, and he will not be held to them. 1 Greenleaf Ev. sec. 60; State *v.* Hecht 23 Minn. 549.

All other questions in the case having been disposed of by
21 the decision in No. 1219, the judgment will be affirmed with costs; and it is so ordered.

Affirmed.

22 MONDAY, *June 23d, A. D.* 1902.

LINDLEY E. SINCLAIR, Plaintiff in Error, *vs.* THE DISTRICT OF COLUMBIA. } No. 1218. April Term, 1902.

In error to the police court of the District of Columbia.

This cause came on to be heard on the transcript of record from the police court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said police court in this cause be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE SHEPARD.

June 23, 1902.

23 TUESDAY, *June 24th, A. D.* 1902.

LINDLEY E. SINCLAIR, Plaintiff in Error,
vs.
THE DISTRICT OF COLUMBIA. } No. 1218.

On motion of Mr. C. C. Cole of counsel for the plaintiff in error, it is ordered by the court that a writ of error to remove this cause to the Supreme Court of the United States issue, and the bond is fixed at the sum of two hundred and fifty dollars.

24 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Lindley E. Sinclair, plaintiff in error, and The District of Columbia, defendant in error a manifest error hath happened, to the great damage of the said plaintiff in error as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 24th day of June, in the year of our Lord one thousand nine hundred and two.

Seal Court of Appeals, District of Columbia.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

25 (*Bond on Writ of Error.*)

Know all men by these presents, that we, Lindley E. Sinclair as principal, and Geo. H. Harries, as surety, are held and firmly bound unto the District of Columbia in the full and just sum of two hundred and fifty dollars to be paid to the said District of Columbia, its certain attorney, successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this thirtieth day of June, in the year of our Lord one thousand nine hundred and two.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said court, between the said Lindley E. Sinclair and the said The District of Columbia number twelve hundred and eighteen (1218) a judgment was rendered against the said Lindley E. Sinclair and the said Lindley E. Sinclair having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said The District of Columbia citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, that if the said Lindley E. Sinclair shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

L. E. SINCLAIR. [SEAL.]
GEO. H. HARRIES. [SEAL.]

Sealed and delivered in the presence of—
C. C. COLE.

Approved by—
R. H. ALVEY,
Chief Justice Court of Appeals
of the District of Columbia.

O. K.
A. B. D.

[Endorsed:] No. 1218. Lindley E. Sinclair plaintiff in error, *vs.* The District of Columbia. Bond on writ of error to Supreme Court, U. S. Court of Appeals District of Columbia. Filed Jul- 11, 1902. Robert Willett, clerk.

26 UNITED STATES OF AMERICA, *ss:*

To the District of Columbia, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Lindley E. Sinclair is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 11th day of July, in the year of our Lord one thousand nine hundred and two.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted July 11, 1902.

A. B. DUVALL, *Att'y D. C.*

[Endorsed:] Court of Appeals, District of Columbia. Filed Jul- 11, 1902. Robert Willett, clerk.

27 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 26 inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Lindley E. Sinclair plaintiff in error *vs.* The District of Columbia No. 1218, April term, 1902, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 11th day of July A. D. 1902.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 18,617. District of Columbia Court of Appeals. Term No. 94. Lindley E. Sinclair, plaintiff in error, *vs.* The District of Columbia. Filed July 22nd, 1902.